TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 659

ROBERT LAWRENCE COMPANY, INC.,
PETITIONER,

vs.

DEVONSHIRE FABRICS, INC.

PETITION FOR CERTIORARI FILED JANUARY 20, 1960.
CERTIORARI GRANTED MARCH 7, 1960.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1959~~ 1960

No. ~~659~~ 27

ROBERT LAWRENCE COMPANY, INC.,
PETITIONER,

vs.

DEVONSHIRE FABRICS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. A]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT LAWRENCE COMPANY, INC., Plaintiff-Appellee,

—against—

DEVONSHIRE FABRICS, INC., Defendant-Appellant.

Appendix of Defendant-Appellant

[fol. 1]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Case No. 120-155

ROBERT LAWRENCE COMPANY, INC., Plaintiffs,

—against—

DEVONSHIRE FABRICS, INC., Defendant.

RELEVANT DOCKET ENTRIES

Date	
1957	
May 9	Filed complaint and issued summons.
May 17	Filed summons and return, served deft. 5-13-57.
June 13	Filed deft's ANSWER.
1958	
Feb. 14	Filed stip. and order substituting deft's attorney.
Mar. 4	Filed affdvt and notice of motion by deft to stay proceedings, etc.—ret. 3-13-58.

Apr. 14 Filed Opinion #24,250—Motion for stay denied —So ordered—Dimock, J., Mailed notice of entry 4-14-58.

Apr. 14 Filed Opposing affdvt.

May 12 Filed Deft's notice of appeal—Mailed copy to O. B. Sachs 5-13-58.

May 12 Filed appeal bond—Fid. & Dep. Co. of Md.

[fol. 2]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

COMPLAINT—Filed May 9, 1957

Plaintiff by its attorney, complaining of the defendan alleges as follows:

First: That at all times hereinafter mentioned the plain tiff was and still is a corporation organized and existin under the laws of the State of Massachusetts with its prin cipal place of business at 217 Friend Street, Boston, Massa chusetts, and engaged in the manufacture of men's clothing

Second: That upon information and belief the defendan Devonshire Fabrics, Inc., was and still is a corporatio organized and existing under the laws of the State of Ne York with offices for the transaction of its business at 4 Seventh Avenue, New York, N. Y. and engaged in the manu facture and sale of woolen and other fabrics for use in th manufacture of men's clothing.

Third: A. That on or about the 4th day of August, 19 the plaintiff ordered from the defendant thirty-seven piec of fabric at a price of Four ($4.00) Dollars per yard plus charge of Eight (8¢) Cents per yard for sponging and e amination and One ($1.00) Dollar per piece for deliver

B. That the defendant falsely and fraudulently stat and represented that such goods were to be delivered rea for the needle, sponged, examined and specially finishe

[fol. 3] C. That the defendant further falsely and fraudulently stated and represented that such goods were "first quality" all in accordance with the order dated August 4, 1955 a copy of which is attached hereto and made part hereof.

Fourth: That thereafter the aforementioned thirty-seven pieces of fabric were delivered to the plaintiff in May, 1956 and the total purchase price of Nine Thousand Sixty-Two Dollars and Forty Three Cents ($9,062.43) paid by the plaintiff.

Fifth: A. That the representations thus made by the said defendant were false and that in truth the facts were that such goods were not ready for the needle, sponged and examined and that such goods were not first quality.

B. That upon information and belief the aforesaid representations as set forth in paragraphs Third B and C were known by the defendant to be false when made and were made with intent to deceive and defraud the plaintiff and to induce him to purchase the aforesaid fabric and pay over the purchase price therefor to the defendant to the injury of the plaintiff.

Sixth: That the plaintiff at the time such representations were made, did not know the truth but believed the said representations to be true and relied upon them and was thereby induced to order said goods, accept delivery thereof and pay over the purchase price therefor.

Seventh: That the amount in controversy herein is in excess of $3,000.00.

Eighth: That the plaintiff has been damaged herein to the sum of Twenty-Five Thousand ($25,000.00) Dollars [fol. 4] as a result of the aforesaid false and fraudulent misrepresentations of the defendant.

Wherefore Plaintiff demands against the Defendant herein for $25,000.00 with interest therein and the costs of this action.

Oscar B. Sachs, Attorney for Plaintiff, 295 Madison Avenue, New York 17, N. Y.

[fol. 5]

IN UNITED STATES DISTRICT COURT

ANSWER—Filed June 13, 1957

Defendant, by William Feinberg, its attorney, answering the complaint herein, alleges as follows:

First: Answering paragraph "Third" of the complaint, the defendant admits that on or about the 4th day of August, 1955, plaintiff ordered from the defendant thirty-seven pieces of fabric at the price and charges set forth by the plaintiff, but except as herein specifically admitted, the defendant denies each and every allegation set forth in said paragraph "Third" of the complaint.

Second: Answering paragraph "Fourth" of the complaint, the defendant admits that thirty-seven pieces of fabric were delivered to the plaintiff and paid for, but except as herein specifically admitted, the defendant denies each and every allegation set forth in said paragraph "Fourth" of the complaint.

Third: Denies each and every allegation set forth in paragraph "Fifth", "Sixth", "Seventh", and "Eighth" of the complaint.

As and for a First Affirmative Defense, the Defendant Further Alleges:

Fourth: That heretofore and shortly after the 4th day of August, 1955, the defendant received an order from the [fol. 6] plaintiff for thirty-six pieces of fabric, style number 910, and accepted said order to the extent and upon the terms and conditions set forth in a certain confirmation dated August 4th, 1955, and mailed to the defendant on August 10th, 1955, a photocopy of which is annexed hereto as Exhibit "A".

Fifth: That said confirmation provided in part, as follows:

> "This order is given subject to the terms hereof stated and those on the reverse side hereof including arbitration which are hereby accepted by the buyer and

shall become a contract only when signed and delivered by the buyer to the seller and accepted in writing by the seller, or when buyer has accepted delivery of the whole or any part of the goods herein described."

Sixth: That thereafter the defendant received and acknowledged the receipt of said confirmation and subsequently accepted delivery of all of the fabric referred to therein, and thereupon the aforesaid confirmation became the contract governing the sale to the plaintiff of the fabric referred to as Style 910, and the said fabric was sold and delivered to the plaintiff and accepted by the plaintiff upon the terms and conditions set forth in defendant's confirmation, and not otherwise.

As and for a Second Affirmative Defense, the Defendant Furtner Alleges:

Seventh: Defendant repeats, reiteration and realleges each and every allegation set forth in the first affirmative defense, numbered "Fourth" to "Sixth" inclusive, with the [fol. 7] same force and effect as if the same were herein and at length fully set forth.

Eighth: That in the aforementioned contract for the sale of the fabric heretofore mentioned and described, it was provided, in part, as follows:

" 9. Any complaint, controversy, or question which may arise with respect to this contract that cannot be settled by the parties thereto, shall be referred to arbitration. If the controversy concerns the condition or quality of merchandise it shall be referred to the Mutual Adjustment Bureau of the cloth and garment trades pursuant to the rules and regulations thereof. All other controversies shall be submitted to the American Arbitration Association.

. . . . . .

"15. Any demand for arbitration covering any controversy or claim arising out of or relating to this contract must be made within thirty days after delivery of the merchandise.

Ninth: That the plaintiff herein has breached the sai agreement and is in default in that it has failed to de mand or proceed to arbitrate its alleged claim, and ha caused this action to be instituted in this Court agains the defendant.

Tenth: That the defendant has at all times been read and willing, and is ready and willing to arbitrate any an all claims arising under the contract of sale, and in ac cordance with the terms of arbitration therein containe [fol. 8] Eleventh: That by reason of the premises, de fendant demands that the trial and all further proceeding herein be stayed.

Wherefore, defendant demands that all further proceed ings herein be stayed and that the defendant have jud ment dismissing the complaint herein with costs.

William Feinberg, Attorney for Defendant, Office P. O. Address, 1440 Broadway, New York N. Y.

NOTE RE EXHIBIT "A" ANNEXED TO ANSWER

This exhibit is identical with confirmation dated Augu 4, 1955 printed hereafter at pages 14 to 16.

[fol. 9]

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION FOR STAY—Filed March 4, 1958

Sir:

Please take notice that upon the annexed affidavit Hugo M. Prince, duly sworn to the 3rd day of March, 19 and the pleadings and proceedings heretofore had here the defendant will move this Court at a Motion Part there to be held in Room 506 of the United States Court Hou Foley Square, New York, New York, on the 13th day March, 1958, at 10:00 o'clock in the forenoon, or as s thereafter as counsel can be heard, for an order pursuan the Federal Arbitration Act, 9 U. S. C. Sec. 3, staying

further proceedings herein, for a further order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, directing that summary judgment herein be entered in favor of the defendant, and for such other and further relief as may be just and proper in the premises.

Please take further notice that pursuant to Rule 6(d) of the Federal Rules of Civil Procedure, all affidavits in opposition to this motion must be served upon the undersigned attorneys for the defendant not less than one day prior to the argument of this motion.

[fol. 10] Dated: New York, N. Y., March 3, 1958.

Yours, etc.

Halperin Natanson Shivitz Scholer & Steingut, By David I. Shivitz, A Partner, Attorneys for Defendant, Office and P. O. Address, 271 Madison Avenue, Borough of Manhattan, City of New York.

To: Oscar B. Sachs, Esq., Attorney for Plaintiff, 295 Madison Avenue, New York, N. Y.

[fol. 11]

AFFIDAVIT OF HUGO M. PRINCE READ IN SUPPORT OF MOTION

State of New York,
County of New York, ss.:

Hugo M. Prince, being duly sworn, deposes and says:

I am the President of the defendant, Devonshire Fabrics, Inc. I make this affidavit in support of a motion by the defendant to stay all proceedings in this action and for summary judgment in favor of the defendant, pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This is an action by a Massachusetts corporation engaged in the manufacture of men's clothing against the defendant, a New York corporation, engaged in the manufacture and sale of woolen and other fabrics for use in the manufacture of men's clothing.

The complaint alleges that on or about August 4, 1955, plaintiff ordered from defendant 37 pieces of fabric; that defendant falsely and fraudulently represented that such

goods were to be delivered ready for the needle, sponged, examined, specially finished and of first quality; that the fabric was delivered to it in May 1956 and a total purchase price of $9,062.43 was paid by plaintiff.

Plaintiff further alleges that the representations made by defendant were false in that the goods were not ready [fol. 12] for the needle, sponged and examined, and were not of first quality. As a result of its alleged reliance upon the representations, plaintiff claims that it was induced to order the goods, accept delivery thereof and pay over the purchase price. Plaintiff claims as its damages the sum of $25,000.

Defendant's answer admits that plaintiff ordered the fabric and that defendant delivered the same to the plaintiff who paid therefor, but otherwise denies the material allegations of the complaint.

Defendant further alleges as affirmative defenses (1) that plaintiff agreed to arbitrate any claims against defendant, and (2) that any demand for arbitration must be made within thirty (30) days after delivery of the merchandise.

The transaction out of which the action arose was initiated on August 4, 1955. Charles Freiman, an independent salesman who carried merchandise in defendant's line, obtained an order from plaintiff for 36 pieces of defendant's fabric, style 910. The order was taken by Mr. Freiman at plaintiff's New York City office located at 200 Fifth Avenue. Robert L. Cohen signed the order on behalf of plaintiff, and a copy thereof is annexed hereto as Exhibit "1" and made a part hereof.

I acknowledged receipt of the order on behalf of defendant on August 10, 1955, and sent plaintiff a confirmation of the order for 37 pieces of fabric. The confirmation form used was that of H. M. Prince Textiles, Inc., the parent corporation to defendant, Devonshire Fabrics, Inc. I am president and a director of both corporations. Copies of my letter of August 10, 1955 and of the order confirmation designated AP #5, are annexed hereto marked Exhibit "2" and Exhibit "3" respectively and made a part hereof.

[fol. 13] The order confirmation, setting forth on its face the terms under which it was made, stated:

"This order is given subject to the terms herein stated and those on the reverse side hereof including arbitration which are hereby accepted by the buyer and shall become a contract only when signed and delivered by the buyer to the seller and accepted in writing by the seller, or when buyer has accepted delivery of the whole or any part of the goods herein described."

On the reverse side, the form, among other things, provided as conditions of sale that:

"9. Any complaint, controversy, or question which may arise with respect to this contract that cannot be settled by the parties thereto, shall be referred to arbitration. If the controversy concerns the condition or quality of merchandise it shall be referred to the Mutual Adjustment Bureau of the cloth and garment trades pursuant to the rules and regulations thereof. All other controversies shall be submitted to the American Arbitration Association.

* * * * * * *

"15. Any demand for arbitration covering any controversy or claim arising out of or relating to this contract must be made within thirty days after delivery of the merchandise."

Receipt of defendant's order confirmation AP #5, dated August 4, 1955, was acknowledged by a representative of plaintiff. A copy of plaintiff's letter of acknowledgment, dated August 16, 1955, is annexed hereto as Exhibit "4" and made a part hereof.

[fol. 14] The questions concerning an additional charge of 8¢ for sponging and examining raised by the last two (2) paragraphs of plaintiff's letter were clarified by defendant's salesman, Charles Freiman, in a conversation he had in New York City with Robert L. Cohen, who had placed the order for plaintiff. Plaintiff's Boston office was notified of this conversation by Mr. Freiman, a copy of his letter, dated August 19, 1955, being annexed hereto as Exhibit "5" and made a part hereof.

As indicated on the face of the order confirmation, delivery of the goods to plaintiff was supposed to be made in August, 1955. Following the making of the sale, the fabric was held at the factory of defendant's sponger, Eastern Textile Shrinkers, Inc., at 880 Broadway in the Borough of Manhattan, City of New York, subject to plaintiff's shipping instructions. No instructions having been issued by the middle of October, I wrote to plaintiff on October 14, 1955 for authority for the sponger to hold the fabric for plaintiff's account. A copy of my letter is annexed hereto as Exhibit "6" and made a part hereof.

I received no response from plaintiff and on October 27, 1955 notified plaintiff that unless shipping instructions or a letter of authorization to the spongers was received by October 31st, the spongers would ship the fabric to plaintiff in Boston. A copy of my letter is annexed hereto as Exhibit "7" and made a part hereof.

My letter produced results and on October 31st, plaintiff telegraphed instructions to "hold our goods at Eastern Textile until further notice letter follows." In the letter which followed, a copy of which is annexed hereto as Exhibit "8" and made a part hereof, plaintiff gave as the reason for its delay, the curtailment of production in its factories in the [fol. 15] New England area. The letter indicated that plaintiff anticipated using the cloth for the 1956 fall season instead of the 1955 season as planned. Plaintiff, at the same time, requested swatches of the cloth and these were promptly sent.

Plaintiff let the sponger retain the fabric for its account until June 1956. Upon information and belief, it was delivered to a common carrier in New York City on or about June 13, 1956 for delivery to plaintiff in Boston. Plaintiff advised defendant of its receipt of the shipment by a letter dated June 20, 1956. Plaintiff paid for the goods in July 1956.

The first indication that plaintiff had any complaint about the quality of the fabric delivered to it was made seven (7) months later. Robert L. Cohen telephoned me in December 1956 and made the claim which is now alleged in the complaint. I advised him then, and I still believe, that the claim coming at that late date was untimely and unwarranted.

Plaintiff had more than six (6) months to examine and inspect the cloth and during that time had, I understand, cut and manufactured it into finished garments. Paragraph 4 of the order confirmation expressly provided that no allowance shall be made after fifteen (15) days from receipt, nor after goods are sponged, cut or otherwise processed.

In its complaint, plaintiff relies upon the sales order it signed on August 4, 1955, Exhibit "1" annexed hereto. This order was superseded by the order confirmation dated the same day, Exhibit "2" annexed hereto. Both documents explicitly and clearly provided that any complaint, controversy, or question which may arise with respect to this [fol. 16] contract that cannot be settled by the parties thereto, shall be referred to arbitration.

At no time prior to, or since, the commencement of this action has plaintiff demanded arbitration in accordance with the terms of the contract. For that reason alone, I believe defendant is entitled to a stay of all proceedings. Since the action was begun, the sole additional step taken after service of the pleadings was the demand by plaintiff to take my deposition upon oral examination. I have not submitted to such examination.

Moreover, my attorneys advise me that the conditions of sale printed on the order confirmation, Exhibit "2", constitute the contract governing this transaction. Under the terms of the confirmation, any demand for arbitration had to be made within thirty (30) days after delivery of the goods. No demand for arbitration having ever been made by plaintiff, much less within that time, I believe that plaintiff has waived whatever rights it may have had.

It is, therefore, respectfully requested that plaintiff be stayed from proceeding further with the claim asserted in this action and that summary judgment against plaintiff be granted to the defendant.

Hugo M. Prince

(Sworn to March 3, 1958.)

[fol. 17]

EXHIBIT 1 ANNEXED TO AFFIDAVIT

(See Opposite) ☞

TELEPHONE
LONGACRE 5-2042

Devonshire Fabrics, Inc.

Woolens

480 SEVENTH AVENUE
NEW YORK 1, N. Y.

DATE Aug 4, 1955

NAME Robert Lawrence Co. Inc. VIA

ADDRESS 217 Friend St
Boston, Mass.

TERMS 1% 10 Net 60 Days
Ship Collect

QUANT	STYLE	COLOR	DESCRIPTION	DELIVERY	CONTENTS	WT	WIDTH	PRICE PER YD	
35	910	Navy	70% Cashmere 25% Wool 5% Viscose					4	=
1 Pc.	910	Brown	"	"				4	=

These goods are guaranteed 70% Cashmere
25% Wool
5% Viscose

These goods are sold as 1st Quality

Note: Call anytime before Oct 1st

150 [illegible]

ALL CUTS MADE AT CUSTOMER'S RISK AND ARE NOT SUBJECT TO RETURN

The undersigned hereby orders the above goods upon the terms as stated, including the terms and conditions printed on the back of this memorandum and forming a part thereof.

Robert Lawrence Co
By [illegible]

[fol. 18]

1. This order is not subject to cancellation except for failure to deliver in accordance with conditions of sale.

2. Seller shall not be held liable for delayed delivery or for non-delivery caused by strikes, fires, or other causes beyond their control. If the production of the mill is curtailed by such causes, delivery shall be demanded only proportionate to the production.

3. The acceptance by common carrier shall constitute delivery.

The title to goods sold hereunder shall pass to the buyer and thereafter the goods shall be at the buyer's risk in the instance of goods ordered held or for which the buyer has failed to supply shipping instructions, upon the assembling of the goods and the holding thereby subject to the buyer's order, followed by due mailing of covering invoice.

4. Merchandise shall not be returned nor allowance made after 15 days from receipt, nor after goods are sponged, cut or otherwise processed. (A period shorter than the maximum of 15 days may be specified on highly seasonal merchandise.)

5. Terms of sale and delivery are set forth herein. Any additional conditions or specifications applying to this order must be stated on the face hereof, and may not be in conflict with the provisions printed hereon.

6. Partial deliveries shall be paid for at contract prices upon maturity of bills therefor.

Partial deliveries shall be accepted by the buyer. If any part of the merchandise is not delivered by the seller, or is not in accordance with the order, the order for the re-
[fol. 19] mainder of the merchandise and the buyer's obligation thereunder shall not be affected thereby.

7. This order is given and accepted subject to limit of credit determinable at any time by the seller.

If the buyer is in default in payment or otherwise in any respect on this or any other order, the seller may defer shipment until such default is removed, and/or may cancel any undelivered portion of this order and/or all outstand-

ing bills of the buyer shall, at the seller's option, become due and payable forthwith.

8. All freight, express, and delivery charges shall be paid by or charged as a separate item to the buyer. This shall not apply to the difference between express and freight, which difference shall be paid by the mill if the goods are ordered by freight but are shipped by express because of lateness in delivery.

9. Any complaint, controversy, or question which may arise with respect to this contract that cannot be settled by the parties thereto, shall be referred to arbitration. If the controversy concerns the condition or quality of merchandise it shall be referred to the Mutual Adjustment Bureau of the cloth and garment trades pursuant to the rules and regulations thereof. All other controversies shall be submitted to the American Arbitration Association.

10. The prices and terms quoted on this order are those actually applying to this transaction and are not subject to any discount not stated hereon, or to any rebate, or modification.

[fol. 20] 11. Prices on any undelivered portion of this contract are subject to any further increase or decrease due to Governmental action and any present or future Federal legislation affecting the seller's costs, and deliveries may be modified to the extent necessitated by any such Governmental action or legislation affecting production. This order will become a contract only when signed by the seller or confirmed in writing by the seller. The order shall be deemed dated as of the date of such confirmation.

12. Merchandise sold sponged will be invoiced at mill yardage.

[fol. 21]

EXHIBIT 2 ANNEXED TO AFFIDAVIT OF HUGO M. PRINCE

August 10th, 1955

Robert Lawrence Co., Inc.
217 Friend Street
Boston, Mass.

Gentlemen:

Thank you for your order #1038 given to our Mr. Freiman. Enclosed please find our confirmation for same.

Very truly yours,

DEVONSHIRE FABRICS, INC.

H. M. Prince
President

HMP:LL
encl.

[fol. 23]

EXHIBIT 3 ANNEXED TO AFFIDAVIT OF HUGO M. PRINCE

(See Opposite) ☞

Original given to Mr. D'lman
Feb. 1 1956

H. M. PRINCE TEXTILES, INC.

[illegible] SEVENTH AVENUE
NEW YORK 1, N. Y.

SOLD TO

Robert Lawrence Co., Inc.
217 Friend St.
Boston, Mass.

DATE August 4th, 1955

[illegible] 1038

BUYER'S ORDER No. AP #5

TERMS 1/10 or Net 60 as of October 1st, 1955

F. O. B. Mill

SALESMAN Freiman

DELIVERY August.

SHIPPING INSTRUCTIONS

All bills payable in New York Bankable funds

QUALITY	LENGTH OF PIECES	WIDTH	DESCRIPTION OF PIECES	COLOR	QUANTITY	PRICE
910		57/58		Navy Brown	35/36 pcs.) 1 pc.)	$4.00

(Quality as sample)

70% Cashmere
25% Wool
5% Dacron
Plus 8¢ sponging & examining.
Mill yardage.
Guarantted ready for the needle.

Payable in New York Bankable Funds at Par

This order is given subject to the terms herein stated and those on the reverse side hereof including arbitration which are hereby accepted by the buyer and shall become a contract only when signed and delivered by the buyer to the seller and accepted in writing by the seller, or when buyer has accepted delivery of the whole or any part of the goods herein described.

ACCEPTED
(Print Name)

By
(Buyer—full name)

Date

ACCEPTED H. M. PRINCE TEXTILES, Inc.
(Print Name)

By
(Seller—full name)

Date August 10th, 1955.

[fol. 24]

CONDITIONS OF SALE

1. This order is not subject to cancellation except for failure to deliver in accordance with conditions of sale.

2. Seller shall not be held liable for delayed delivery or for non-delivery caused by strikes, fires, or other causes beyond their control. If the production of the mill is curtailed by such causes, delivery shall be demanded only proportionate to the production.

3. [illegible] acceptance by common carrier shall constitute delivery.

The title to goods sold hereunder shall pass to the buyer and thereafter the goods shall be at the buyer's risk in the instance of goods ordered held or for which the buyer has failed to supply shipping instructions, upon the assembling of the goods and the holding thereby subject to the buyer's order, followed by due mailing of covering invoice.

4. Merchandise shall not be returned nor allowance made after 15 days from receipt, nor after goods are sponged, cut or otherwise processed. (A period shorter than the maximum of 15 days may be specified on highly seasonal merchandise.)

5. Terms of sale and delivery are set forth herein. Any additional conditions or specifications applying to this order must be stated on the face hereof, and may not be in conflict with the provisions printed hereon.

6. Partial deliveries shall be paid for at contract prices upon maturity of bills therefor.

[fol. 25] Partial deliveries shall be accepted by the buyer. If any part of the merchandise is not delivered by the seller, or is not in accordance with the order, the order for the remainder of the merchandise and the buyer's obligation thereunder shall not be affected thereby.

7. This order is given and accepted subject to limit of credit determinable at any time by the seller.

If the buyer is in default in payment or otherwise in any respect on this or any other order, the seller may defer

shipment until such default is removed, and/or may cancel any undelivered portion of this order and/or all outstanding bills of the buyer shall, at the seller's option, become due and payable forthwith.

8. All freight, express, and delivery charges shall be paid by or charged as a separate item to the buyer. This shall not apply to the difference between express and freight, which difference shall be paid by the mill if the goods are ordered by freight but are shipped by express because of lateness in delivery.

9. Any complaint, controversy, or question which may arise with respect to this contract that cannot be settled by the parties thereto, shall be referred to arbitration. If the controversy concerns the condition or quality of merchandise it shall be referred to the Mutual Adjustment Bureau of the cloth and garment trades pursuant to the rules and regulations thereof. All other controversies shall be submitted to the American Arbitration Association.

10. The prices and terms quoted on this order are those actually applying to this transaction and are not subject [fol. 26] to any discount not stated hereon, or to any rebate, or modification.

11. Prices on any undelivered portion of this contract are subject to any further increase or decrease due to Governmental action and any present or future Federal legislation affecting the seller's costs, and deliveries may be modified to the extent necessitated by any such Governmental action or legislation affecting production. This order will become a contract only when signed by the seller or confirmed in writing by the seller. The order shall be deemed dated as of the date of such confirmation.

12. Merchandise sold sponged will be invoiced at mill yardage.

15. "Any demand for arbitration covering any controversy or claim arising out of or relating to this contract must be made within thirty days after delivery of the merchandise."

[fol. 27]

EXHIBIT [illegible] AFFIDAVIT OF HUGO M. PRINCE

(Letterhead of Robert Lawrence, Boston, Massachusetts)

August 16, 1955

Devonshire Fabrics, Inc.
450 Seventh Avenue
New York 1, N. Y.
Attention: Mr. H. M. Prince

Gentlemen:

We have received your confirmation AP. #5, dated August 4, for 37 pieces of Quality 910.

Mr. Robert L. Cohen who placed the order, has asked me to write you that in his understanding of the order there was no mention originally of 8¢ additional for sponging and examining above and beyond the $4 price.

We will retain the confirmation in our Boston office until you get in touch with Mr. Cohen either here or at our New York office regarding this discrepancy.

Very truly yours,

ROBERT LAWRENCE COMPANY
/s/ TED BLANK
Ted Blank

TB:ik
cc: NYO

[fol. 28]

EXHIBIT 5 ANNEXED TO AFFIDAVIT OF HUGO M. PRINCE

August 19th, 1955

Robert Lawrence Company
217 Friend Street
Boston 14, Mass.

Attention: Mr. Ted Blank

Gentlemen:

In the absence of Mr. H. M. Prince, the writer hereby acknowledges your letter of August 16th and contents have been carefully noted.

On receipt of your letter, the writer immediately contacted Mr. Robert L. Cohen. Mr. Cohen no doubt, upon his return to Boston will satisfy the points brought up in your letter.

We remain

Very truly yours,

DEVONSHIRE FABRICS, INC.

Charles Freiman
Menswear Division

CF:LL

[fol. 29]

EXHIBIT 6 ANNEXED TO AFFIDAVIT OF HUGO M. PRINCE

October 14th, 1955

Robert Lawrence Co., Inc.
217 Friend Street
Boston, Mass.

Attn: Mr. Robert Cohen

Dear Mr. Cohen:

With reference to the piece goods as per our invoices dated September 15th as of October 1st, 1955, we have been keeping these goods for your account in accordance with your order at our spongers, Eastern Textile Shrinkers, Inc. We have expected you to give us shipping instructions for these goods before October 1st, but not later than October 1st.

Our spongers have informed us that you have not called in those pieces at the present time. Will you therefore please confirm in writing immediately authorizing the Eastern Textile Shrinkers to hold these pieces goods for your account at their warehouse. Otherwise, the sponger has been instructed to make shipment to your Boston address.

Very truly yours,

DEVONSHIRE FABRICS, INC.

H. M. Prince
President

HMP:LL

cc: Freiman
Peter

[fol. 30]

EXHIBIT 7 ANNEXED TO AFFIDAVIT OF HUGO M. PRINCE

October 27th, 1955

Robert Lawrence Co.
217 Friend Street
Boston, Mass.

Attn: Mr. Robert Cohen

Dear Mr. Cohen:

On October 14th, we wrote to you regarding disposition of style 910 which you purchased from us and which we have been holding for your account at our spongers Eastern Textile Shrinkers, Inc. As we wrote you then, our spongers are demanding shipping instructions for these goods or a letter of authorization from you to them to hold these goods for your account. Up to the present writing, neither Eastern Textile Shrinkers or ourselves have received any acknowledgment of this letter. Repeated calls to your New York office have given us no satisfaction in this matter and we are writing to you again to ask you to take care of this matter at once.

We are willing to cooperate with you to the fullest extent as regarding keeping these goods at our spongers, but they are insisting on some authorization from you since these goods are yours and not ours.

Unless we hear from you by Monday, October 31st, 1955, the spongers will make shipment to your Boston address.

[fol. 31] Your immediate attention to this will be greatly appreciated.

Very truly yours,

DEVONSHIRE FABRICS, INC.

H. M. Prince
President

HMP:LL
reg.ret.rec.req.

[fol. 32]

EXHIBIT 8 ANNEXED TO AFFIDAVIT OF HUGO M. PRINCE

(Letterhead of Robert Lawrence, Boston, Massachusetts)

October 31, 1955

Devonshire Fabrics, Inc.
450 Seventh Avenue
New York 1, N. Y.

Gentlemen:

Today we sent you a wire which reads as follows:

"HOLD OUR GOODS AT EASTERN TEXTILE UNTIL FURTHER NOTICE. LETTER FOLLOWS."

We are working under an unfortunate handicap due to circumstances beyond our control. The recent floods in New England have curtailed our production in our factories in the disaster area.

Therefore, we will be unable to use the cloth which our Mr. Cohen purchased from you this season. We anticipate using it for the coming fall season. We would appreciate your holding these goods at Eastern Textile for our account.

Thank you for your kind co-operation.

Yours very truly,

ROBERT LAWRENCE COMPANY

/s/ A. E. EISENBERG
A. E. Eisenberg

AEE:D
P. S. Please mail us about ten swatches of this cloth.

[fol. 33]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Civil Action 120-155

AFFIDAVIT OF ROBERT L. COHEN READ IN OPPOSITION TO MOTION

State of New York,
County of New York, ss.:

Robert L. Cohen, being duly sworn, deposes and says:

I am the President of the plaintiff corporation and make this affidavit in opposition to the motion by defendant to stay all proceedings in this action until all the issues raised herein have been submitted to arbitration.

The basis of the complaint is fraud and misrepresentation on the part of defendant in inducing me to enter into a contract to purchase blended fabric then in existence from the defendant. The relationship between my company and Mr. Prince's was established through fraud and misrepresentation, and the complaint with respect thereto refers to misrepresentations all made prior to the signing of the order by me.

Significantly in his affidavit Mr. Prince at no point denies that the goods were not "first quality" as represented.

The goods in question were received at our Boston factory in late June, 1956. Since they were allegedly sponged and "ready for the needle" no further inspection by us or by our sponger was called for under trade practice. "Ready for the needle" in the trade means that I did not have to [fol. 34] sponge or inspect the goods and that they are perfect goods ready to use without further preparation. Consequently my factory people properly relying on defendant's representations held the goods after checking the fact that the correct number of pieces had arrived and that they were properly labelled. When we came to use the goods in the fall of 1956 the fraud practiced upon us was first discovered and we then sent the goods to our sponger.

The order I signed (attached to defendant's affidavit) was prepared by defendant's salesman and states on its

face: "These goods are sold as first quality." That they are not so is a fact which even defendant must admit as its own tests of some of the pieces as recently as December, 1957 so demonstrate. Moreover, defendant does not deny the defects in his affidavit. These defects, evidence of which has been submitted to defendant by plaintiff in addition to defendant's own recent tests are so considerable and serious that one is led inescapably to the conclusion that defendant could never have intended to deliver "first quality" goods.

I am advised by my attorney that the full extent of the fraud and misrepresentations by reason of the very nature of fraud cannot be brought to full light without an examination of defendant which he has been resisting through delaying tactics more fully spelled out *infra*.

On December 13, 1956, after discovery of the fraud practiced by defendant, my attorney in Boston wrote to defendant stating our position as per Exhibit 1 attached hereto. Therein we offered to return the goods to defendant. Defendant rejected our view to which reply was made on December 17, 1956, as per Exhibit 2, reiterating our position and stating that the goods were being held for [fol. 35] defendant's account. No communication was thereafter received from defendant.

Defendant in his affidavit in support of this motion makes several statements of fact which are incomplete and though perhaps not germane to the specific issue at hand must be pointed out to the Court lest they be accepted as true.

1. Defendant refers to a confirmation. But it is an incomplete document because it omits items 13 and 14 on the back thereof, whatever they may be. This alleged confirmation which was attached to the answer does not bear plaintiff's signature or defendant's. My attorney called this fact to the attention of the then counsel for defendant who stated that he would rectify the oversight by furnishing us with a signed copy of the confirmation. This has never been done. This is not to deny that I ordered the goods but the inducements for the purchase are the oral statements made to me and the representations made on the order prepared by defendant's salesman and signed

by me on August 4, and not the alleged unilateral confirmation. Defendant also relied on the order as a contract in a letter written to us in February, 1956—Exhibit 3. I would not have bought the goods unless guaranteed to be first quality.

2. Defendant states that the only additional step in this action since the filing of the answer has been the notice of examination served by me. The complete picture is as follows:

On July 26, 1957 the notice to examine was served on the attorney for defendant by mail. Pursuant to agreement, the examination was set for August 20, 1957. If my [fol. 36] recollection serves me right it was between the date of service of the answer and July 26th that counsel for defendant told my lawyer that the defendant was planning to substitute counsel at that time. He did not do so however until February, 1958 which change was then, after earlier numerous adjournments, used as the basis for a further adjournment of plaintiff's examination of defendant.

Before the examination of August 20, 1957 could take place, defendant through its counsel requested an adjournment to September 5, 1957 to allow for a conference to discuss the issues and possible settlement. That conference was held at the office of counsel for defendant on or about August 27, 1957. No settlement resulted. At this conference, in an effort to expedite settlement and be open and frank, my lawyer exhibited to defendant reports from our own sponger on the goods sold to us. We again offered to return the goods to defendant.

A second adjournment was requested by defendant until September 19th.

Defendant then indicated that it elected to exercise the option, requested at the August 27th meeting, or shortly thereafter, of testing the goods themselves, the other alternative, and also acceptable to us, being to visit our factory. As a consequence, adjournments were granted to October 10, 1957 and November 12, 1957 and even into December.

The goods were tested by defendant. In December I attended a conference at the office of counsel for defendant

at which time he stated that some of the goods had tested bad and some tested acceptable. Significantly defendant did not reciprocate by furnishing us with copies of his test although we had furnished him with copies of ours. [fol. 37] Possible settlement was again discussed and rejected. My lawyer then again renewed his demand for a prompt examination and was told that Hugo Prince, President of defendant, was in Mexico. Further adjournments were necessarily granted for that reason and again in late December and January, 1958 because of the illness of defendant's counsel.

Ultimately, at my insistence, the examination was set by telephone for the first week in February. At this juncture the defendant's counsel requested by telephone a further delay to February 17th until Mr. Prince returned from an out-of-town trip. Shortly thereafter, defendant substituted new counsel who asked for and received another adjournment until February 20, 1958 for which examination Mr. Prince did not appear.

Mr. Prince in his affidavit argues on the basis of these facts that he has not waived his right to have the matter settled by arbitration, if indeed he has ever had such right. The facts do show that on May 28, 1957 counsel for both parties together reviewed the question of arbitrability of the dispute, and my lawyer furnished counsel with such authorities. This fact is borne out by the attached copy of a letter dated May 29, 1957 from defendant's attorney (Exhibit 3).

At no time subsequent to that letter did defendant revive the question of arbitration except by reference in his answer on which no action was subsequently taken or suggested throughout the meetings or numerous telephone conversations on this matter with my attorney or with me.

Proceeding on the theory that the matter would be tried in a court of law and relying on counsel's failure to seek a stay after the mutual review of the law, my attorney [fol. 38] advised me to cooperate with defendant in giving information which could have been obtained only on an examination before trial by defendant, thus saving time for both parties and expense for defendant. Defendant has now ascertained that there is substantial validity to plain-

tiff's contentions and is attempting to resort to procedural devices because of my cooperation and the information it could not have otherwise obtained from us had it insisted on arbitration from the outset of this action.

I believe that if the motion is granted defendant will be allowed to convert delaying tactics and my cooperation with his counsel, as well as my attorney's frankness, into unfair advantage.

Had defendant been interested in expediting this matter he could have avoided the many delays caused by the adjournments and sought arbitration himself which even now he does not seek, or he could have accepted the proffer of arbitration made by my attorney in May, 1957—Exhibit 4.

Under all these circumstances defendant has waived whatever right to arbitration it may have had.

3. Mr. Prince states in his affidavit, page 5: "Plaintiff . . . had, I understand, cut and manufactured it (the cloth) into finished goods" prior to December 6, 1956. This, of course, is not a fact. Mr. Prince has chosen to forget my counsel's letters of December 13 and 17, in which it was plainly stated that we wanted to return the merchandise. Likewise, he forgets that we so told him at the conference of August 27, 1957 and that we subsequently sent him swatches from 23 pieces for testing as requested by him. After his rejection of our offer of December 13th we made about 300 coats to fill a commitment to customer (sic), which [fol. 39] commitment was made prior to our learning of the fraud and relying on the representations of defendant. Our customer because of the inferior quality of the goods insisted on a very low price and the coats were sold without recourse at a loss by us. All of this including the fact that over two-thirds (⅔) of the fabric is still on hand is well known to Mr. Prince and his prior counsel.

It is therefore respectfully requested that defendant's motion be denied in all respects.

Robert L. Cohen

(Sworn to March 14, 1958.)

[fol. 40]

EXHIBIT 1 ANNEXED TO AFFIDAVIT OF ROBERT L. COHEN

LAWRENCE R. COHEN
Counsellor-at-Law
10 State Street
Boston 9, Mass.

RIchmond 2-1050
Cable Address
"Larco-Boston"

December 13, 1956

Devonshire Fabrics, Inc.
450 Seventh Avenue
New York 1, New York

Re: Robert Lawrence, Inc.

Gentlemen:

I write in behalf of my client, Robert Lawrence, Inc., with reference to a purchase of cloth from your company made in the summer of 1955. This was a substantial order of cloth of a specified weight which was to contain 70% cashmere, 25% wool, and 5% dacron, and was to weigh 18½ to 19 ounces. The material was sold as first quality merchandise.

The cloth was to have been shipped on an agreed schedule.

My client has recently learned that this cloth does not conform to the sample shown, nor does it conform to the representations made by you as set out in the order of purchase. It is definitely not first quality merchandise and suffers from a number of serious defects which I will not attempt to enumerate at this writing. These defects are so considerable and serious that one is led inescapably [fol. 41] to the conclusion that you were aware of them at the time the cloth was ordered, and that your company never intended to deliver the merchandise it represented it was selling.

Most of this cloth is completely unusable for a house which makes quality clothing such as my client. Some of it can be used for a limited purpose. In any event, the cloth received is worth far less than it would have been had it conformed to the representations made by your company.

The Robert Lawrence Company is desirous of returning to you immediately all pieces of this merchandise which it cannot possibly dispose of. It is prepared to mitigate its damages by using a certain part of the cloth, provided it receives some adjustment. On the cloth returned, it would, of course, expect to receive payment in full of what it has paid.

My client and I are prepared to discuss this matter with you or your attorney. However, this question must be disposed of immediately as we are in the heart of the season. I would appreciate your notifying me at once of your attitude concerning this claim and the address to which you desire the merchandise returned.

If this matter cannot be adjusted by amicable arrangement within the very near future, my client will have no recourse other than to institute legal proceedings either in Massachusetts or in New York to recover the damages it has suffered as a result of your misrepresentations.

Very truly yours,

LRC:FS
Registered Mail
Return Receipt Requested

[fol. 42]

EXHIBIT 2 ANNEXED TO AFFIDAVIT OF ROBERT L. COHEN

LAWRENCE R. COHEN
Counsellor-at-Law
10 State Street
Boston 9, Mass.

December 17, 1956

Devonshire Fabrics, Inc.
450 Seventh Avenue
New York 1, New York

Gentlemen:

I am in receipt of your letter of December 14 concerning the claim of Robert Lawrence, Inc.

It is clear that you do not understand the nature of my client's claim against you. It is our feeling that you fraudulently misrepresented the nature and quality of the product that you intended to deliver to my client. My client relied on your misrepresentations and was damaged. I cannot feel that such a wide divergence from sample, quality, and usual practice, was a simple mistake in turning out the merchandise. We feel and assert that in negotiating this contract of sale, you knowingly misrepresented the merchandise you intended to deliver.

If our view of your intentions is correct, the terms of your so-called "confirmation" of August 4, 1955 do not control. Nor is it any defense that my client might have examined and inspected the merchandise at an earlier date. It refrained from doing so because it relied on what you had represented the merchandise to be.

I am aware of the fact that this explanation will probably not alter your attitude concerning this claim but, before [fol. 43] instituting legal proceedings, I thought it only fair to apprise you precisely of the nature of this claim. I suggest, gratuitously, that you consult your own attorneys concerning this.

Because of your refusal to accept the return of the defective merchandise, I am instructing Robert Lawrence, Inc. to mitigate its damages by using whatever cloth it can. That which is useless for their purposes will be held for a reasonable time and thereafter, upon prior advice to you, it will be sold and you will be credited with the amount received.

Very truly yours,

LRC:FS

[fol. 44]

EXHIBIT 3 ANNEXED TO AFFIDAVIT OF ROBERT L. COHEN

DEVONSHIRE FABRICS, INC.
450 Seventh Avenue, New York 1, N. Y.
LOngacre 3-2642

February 23, 1956

Robert Lawrence Company
217 Friend Street
Boston, Massachusetts

Att: Mr. James Cohen, Treasurer

Dear Mr. Cohen:

We received from our factors Crompton-Richmond Company, a copy of your letter to them of February 21st.

We will try to give you a short resume of this transaction. Mr. Robert Cohen signed an order for 36 pieces, style 910 at $4.00 per yard on October 4, 1955, to be delivered immediately dated as October 1, 1955 on a 1/10 or Net 60 day basis. When we wanted to make delivery we received a letter from your Company signed by Mr. A. E. Eisenberg dated October 31st, asking us to hold these goods at our spongers, Eastern Textile Shrinkers, Inc., until further notice. In this letter Mr. Eisenberg writes that due to the floods they were unable to use the cloth which Mr. Cohen had purchased for the current season and they will have to use it for the coming Fall season; therefore, he

would appreciate our holding these goods at Eastern Textile Shrinkers for their account.

This should explain the situation and there is no question that Mr. Robert Cohen who has signed the order has made a bona-fide purchase. We would therefore appreciate, [fol. 45] if as indicated in your letter, you will forward your check to Crompton-Richmond Company immediately.

Very truly yours,

DEVONSHIRE FABRICS, INC.

H. M. Prince
President

HMP:eak
CC: Mr. Hebner
Crompton-Richmond Co.
1071 Avenue of the Americas
New York, New York

[fol. 46]

EXHIBIT 4 ANNEXED TO AFFIDAVIT OF ROBERT L. COHEN

WILLIAM FEINBERG
Counselor at Law

1440 Broadway
at 40th Street
New York 18, N. Y.

Telephone
Penn 6-2474-5-6

May 29th, 1957

Oscar B. Sachs, Esq.
295 Madison Avenue
New York City

RE: ROBERT LAWRENCE COMPANY, INC.
VS. DEVONSHIRE FABRICS, INC.

Dear Mr. Sachs:

I called your office earlier this afternoon but you were not in, and I am therefore taking the liberty of requesting an extension of time for the service of the defendant's an-

swer until June 13th, 1957, and trust that the same will be satisfactory to you and that you will be good enough to sign and return the original and one copy of the enclosed stipulation to me.

I am adopting this procedure as I am leaving on vacation this afternoon and will not return until next Tuesday. I therefore trust you will pardon my sending you the enclosed stipulations without first talking to you, and that you will not deem it an imposition.

With reference to our conversation yesterday, I have not yet had an opportunity to fully examine the authori- [fol. 47] ties, but I would like to take up with the defendant the suggestion of referring the matter to arbitration on the condition that you mentioned, namely, the waiver by the defendant of the provision which requires that a demand for arbitration be made within thirty days after delivery of the merchandise. Upon my return I will arrange a meeting with the defendant to ascertain if that procedure would be acceptable, provided, of course, that your client also agreed.

Thanking you in advance for yor courtesy in granting the extension of time as indicated on the enclosed stipulation, I am

Very truly yours,

/s/ HARRY OSTROV
Harry Ostrov

HO:JF
ENC.

[fol. 48]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

#475

MEMORANDUM OF DIMOCK, *D.J.*—April 12, 1958

This is a motion by defendant for an order pursuant to Title 9 U. S. C. §3 to stay all proceedings pending arbitration and for summary judgment. The action arises out of a contract in which plaintiff ordered and defendant agreed to deliver certain goods. Plaintiff alleges that he has disaffirmed the contract, tendered back the goods and is now claiming damages for fraud in the inducement.

Defendant's right to a staying order pursuant to section 3, Title 3 U. S. C. is dependent upon the requirements of section 2. Bernhardt v. Polygraphic Co., 350 U. S. 198. Section 2 provides:

> "A written provision in * * * a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract * * * shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

This is a substantial issue between the parties as to which of two documents comprises the final agreement between them: the order of August 4, 1955, given by plaintiff to defendant's salesman, or the order of confirmation accepted by plaintiff on August 10, 1955. Both documents, however, contain a written provision to arbitrate disputes arising out of the contract. The only difference between [fol. 49] them is that the confirmation provides for a demand for arbitration within 30 days. The issue is not relevant at this point, however, since both arbitration provisions meet the requirements of section 2.

Plaintiff contends that the complaint alleges fraud in the inducement of the contract and thus presents an issue as to whether the agreement to arbitrate was valid. The ques-

tion whether or not there is a valid agreement to arbitrate must be decided by the court prior to the issuance of a stay and cannot be submitted to arbitration "as a controversy thereafter arising out of such contract" within section 2. Kulukundis Shipping Co. v. Amtorg Trading Corp., 2 Cir., 126 F. 2d 978. If the contract was fraudulent in its inception and therefore voidable at the option of the plaintiff and plaintiff has disaffirmed such contract, then there is no valid agreement to arbitrate which would justify a stay. Since the question is presented here on a motion for summary judgment, the issuance of a stay at this time depends upon whether there is a genuine issue of fact as to validity of the agreement. Almacenes Fernandez, S.A. v. Golodetz, 2 Cir., 148 F. 2d 625. Plaintiff's affidavit states that he was induced to enter into the contract by fraudulent misrepresentations made prior to the signing of the order. I am satisfied that the affidavits in this case present a genuine issue of fact on this question. I must therefore deny the motion for a stay of this action.

Motion denied.

So ordered.

Dated: April 12, 1958.

E. J. Dimock, United States District Judge.

[fol. 50]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed May 12, 1958

Sir:

Notice Is Hereby Given that the above named defendant, Devonshire Fabrics, Inc., hereby appeals to the United States Court of Appeals for the Second Circuit from an order entered in this action on the 14th day of April, 1958, denying a motion by said defendant for an order pursuant to Title 9 U. S. C. Sec. 3 to stay all proceedings in this action pending arbitration.

Dated: New York, N. Y., May 12, 1958.

Yours, etc.

Halperin Natanson Shivitz Scholer & Steingut, By David I. Shivitz, A Partner, Attorneys for Defendant, Office and P. O. Address 271 Madison Avenue, Borough of Manhattan, City of New York.

To: Oscar B. Sachs, Esq., Attorney for Plaintiff, 295 Madison Avenue, New York, N. Y.

[fol. 51]

In United States Court of Appeals
For the Second Circuit

No. 121—October Term, 1958

(Argued January 16, 1959)

Docket No. 25209

Robert Lawrence Company, Inc., Plaintiff-Appellee,

—against—

Devonshire Fabrics, Inc., Defendant-Appellant.

Before: Medina, Lumbard and Burger, Circuit Judges.

Opinion—October 28, 1959

Appeal from an order of the United States District Court for the Southern District of New York, Edward J. Dimock, Judge.

The defendant appeals from an order denying a stay pending arbitration as provided in the arbitration clause of a contract involving interstate commerce. Opinion below not reported. Reversed.

[fol. 52] Oscar B. Sachs, New York, N. Y., for plaintiff-appellee.

Martin H. Schneider, New York, N. Y. (David I. Shivitz and Halperin, Natanson, Shivitz, Scholer & Steingut, New York, N. Y., on the brief), for defendant-appellant.

MEDINA, Circuit Judge:

Devonshire Fabrics, Inc. (Devonshire) appeals from an order denying its motion for a stay of proceedings pending arbitration pursuant to the United States Arbitration Act, 9 U. S. C. Section 3.

Plaintiff in this action, Robert Lawrence Company, Inc. (Lawrence) is seeking damages for allegedly fraudulent misrepresentations made by Devonshire inducing it to purchase and pay for a quantity of woolen fabric. The transaction out of which this case arose was initiated on August 4, 1955 when Lawrence, a Massachusetts corporation, ordered through its New York City office 36 pieces of a certain style of wool. Devonshire, a New York corporation, upon receipt of the order issued a confirmation which differed in several respects from the terms of the order. While the parties disagree as to which document embodies the final contract, each of the two documents contains the following provision for aribtration:

> "Any complaint, controversy, or question which may arise with respect to this contract that cannot be settled by the parties thereto, shall be referred to arbitration. If the controversy concerns the condition or quality of merchandise it shall be referred to the Mutual Adjustment Bureau of the cloth and garment [fol. 53] trades pursuant to the rules and regulations thereof. All other controversies shall be submitted to the American Arbitration Association."

Delivery of the goods, originally scheduled for October 1, 1955 was postponed at Lawrence's request until June 1956 when shipment to Boston was made. Lawrence paid the purchase price of $9,062.43 in July 1956. According to Lawrence, whose version of the fraud we must accept in the present posture of the case, certain latent defects were subsequently discovered and the merchandise proved not to be "first quality" as called for by the agreement. It is disputed whether Lawrence "rescinded" the contract or whether it waived its right to do so by later inconsistent acts.

The court below denied the stay of proceedings pending arbitration and held: "The question whether or not there is a valid agreement to arbitrate must be decided by the court prior to the issuance of a stay and cannot be submitted to arbitration 'as a controversy thereafter arising out of such contract' within section 2. * * * If the contract was fraudulent in its inception and therefore voidable at the option of the plaintiff and plaintiff has disaffirmed such contract, then there is no valid agreement to arbitrate which would justify a stay."

I

*Questions of the Validity and Interpretation of an Arbitration Agreement "In Any Maritime Transaction or a Contract * * * Involving Commerce" Are Governed by Federal Not by Local Law*

The case involves questions left open by the Supreme Court in *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 1956, 350 U. S. 198, and these questions are interesting and [fol. 54] important. The basic inquiry must be whether the validity and interpretation of the arbitration clause of the contract in this case is governed by Federal law, i.e. the federal Arbitration Act, or by local law. But this critical issue is imbedded in a proliferation of collateral questions, and all must be considered against the background of the concurring opinion of Mr. Justice Frankfurter in *Bernhardt* to the effect that, in order to avoid vexing constitutional questions under *Erie R.R.* v. *Tompkins*, 1938, 304 U. S. 64, the Arbitration Act must be held wholly inapplicable in a diversity case. We are reluctant to disagree with so eminent a jurist whose views are so widely respected but feel compelled to reach a different conclusion, not only because the exclusion of diversity cases would emasculate the federal Arbitration Act, but because we find a reasonably clear legislative intent to create a new body of substantive law relative to arbitration agreements affecting commerce or maritime transactions. Thus we think we are here dealing not with state-created rights but with rights arising out of the exercise by the Congress of its constitutional power to regulate commerce and hence there

is involved no difficult question of constitutional law under *Erie*.

The arbitration agreement before the Court in *Bernhardt* did not involve commerce nor did it affect a maritime transaction. But the defendant in that case moved for a stay pending arbitration on the theory that the federal Arbitration Act was applicable because the limitations of Section 2 were said not to affect Section 3, and, even if the Act was not applicable, that arbitration was a mere mode of procedure and a federal court should follow its own practice rather than that of Vermont because in matters of procedure the law of the forum controls. This reasoning would have by-passed certain old Vermont cases holding arbitration agreements to be revocable prior to [fol. 55] the making of an award and unenforceable. But such a result ran into *Erie* v. *Tompkins* head-on for the obvious reason that, had the case not been removed from the Vermont state court by reason of the diversity of citizenship of the parties, the determination of the merits of the controversy between the parties in the federal court might well have been just the opposite to the one that would have been reached had the case been permitted to remain in the state court. So the Court decided the case by holding: (1) that the federal Arbitration Act was inapplicable because the limitation to commerce and maritime matters in Section 2[1] applied as well to Section 3[2] and the rest of

[1] Section 2 of the Act provides:

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

[2] Section 3 of the Act provides:

"If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbi-

the Act; and, (2) that the enforceability of an arbitration agreement, apart from the Arbitration Act, "substantially affects the cause of action created by the State" and, because the dispute between the litigants was sufficiently substantive to bring into operation the *Erie* doctrine, the Court refused to apply the rule that the law of the forum governs matters of procedure. The Court flatly disagreed with the statement that arbitration "is merely a form of [fol. 56] trial." Instead, the Court held that it was dealing with "a right to recover that owes its existence to one of the States, not to the United States"; and the view of the federal District Judge in Vermont as to the Vermont law relative to the enforceability of arbitration agreements was adopted. This conclusion was reached notwithstanding the fact that in several other contexts the enforceability of an arbitration agreement had generally been considered to be procedural only.[3] But the constitutional difficulties

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tration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."

[3] For choice of law purposes it has been generally held that the forum is free to apply its own "remedy" and is not compelled to enforce an arbitration agreement by applying the law of the State with the controlling contacts. See *Meacham* v. *Jamestown Franklin & Clearfield Ry.*, 1914, 211 N. Y. 346, 105 N. E. 653; *Gantt* v. *Felipe Y Carlos Iiurtado & Cia, Ltda.*, 1948, 297 N. Y. 433, 79 N. E. 2d 815; *Vitaphone Corp.* v. *Electrical Research Products*, 1933, 19 Del. Ch. 247, 166 Atl. 2 5. For the purpose of determining whether a state act enforcing arbitration is constitutional or an intrusion upon federal admiralty jurisdiction the Supreme Court held arbitration to be "remedial." *Red Cross Line* v. *Atlantic Fruit Co.*, 1924, 264 U. S. 109. A similar characterization was also made to determine if the New York Act could constitutionally apply retroactively. *Matter of Berkovitz* v. *Arbib & Houlberg*, 1921, 230 N. Y. 261, 130 N. E. 288. In pre-Erie diversity cases the enforcement of an arbitration agreement was deemed "procedural" and state statutes upholding the agreement were accordingly held inapplicable. *California Prune & Apricot Growers' Ass'n* v. *Catz American Co.*, 9 Cir., 1932, 60 F. 2d 788; *Lappe* v. *Wilcox*, N. D. N. Y., 1926, 14 F. 2d 861. And the federal judicial power in admiralty was deemed not to have been unduly extended by the new enforcement provisions of the Act

Justice Frankfurter feared only become operative if the Arbitration Act is regarded as exclusively procedural in character and scope. And, if the Congress had relied solely [fol. 57] on its power to regulate procedure in the federal courts to make arbitration agreements valid and enforceable, it might well be doubted whether the constitutional base provided adequate support for the legislative structure. But see Sturges and Murphy, Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act, 17 Law & Contemp. Probs. 580, 587 (1952).

We think it is reasonably clear that the Congress intended by the Arbitration Act to create a new body of federal substantive law affecting the validity and interpretation of arbitration agreements. In the first place Section 2 of the Arbitration Act specifically limits its applicability to "any maritime transaction or a contract evidencing a transaction involving commerce." This indicates a congressional intention to rely on the admiralty power implied from Article III, Section 2, Clause 3 and the commerce power, Article I, Section 8, Clause 3. Such intention is confirmed by the legislative history. See H. R. Rep. 96, 68th Cong., 1st Sess., p. 1 (1924). Moreover, the *Bernhardt* ruling is specifically to the effect that the maritime or commerce requirements had to be met before any other section of the Act could be applied. It is true that an additional reason for construing the Act "narrowly" was that such a construction avoided a constitutional difficulty arising out of the *Erie* doctrine; but we think this does not lessen the force of the principal basis for the ruling which is that the Congress intended the maritime or commerce requirements to permeate the Act in its entirety.

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but was a valid exercise of congressional power "to provide remedies in matters falling within the admiralty jurisdiction of the federal courts, and to regulate their procedure." *Marine Transit Corp.* v. *Dreyfus*, 1932, 284 U. S. 263. Indeed, even in the *Erie* context prior to *Bernhardt* the dominant view was that the enforceability of arbitration agreements was procedural. Compare *Murray Oil Products Co.* v. *Mitsui & Co.*, 2 Cir., 1944, 146 F. 2d 381; *Parry* v. *Bache*, 5 Cir., 1942, 125 F. 2d 493; *Pioneer Trust & Savings Bank* v. *Screw Mach. Products Co.*, E. D. Wis., 1947, 73 F. Supp. 578 with *Tejas Development Co.* v. *McGough Bros.*, 5 Cir., 1947, 165 F. 2d 276.

It is also clear that the Congress intended to exercise as much of its constitutional power as it could in order to make the new Arbitration Act as widely effective as possible. One of the dark chapters in legal history concerns the validity, interpretation and enforceability of arbitration agreements. From the standpoint of business men generally and of those immediately affected by such agree [fol. 58] ments they were beneficial and salutary in every way. But to the courts and to the judges they were anathema. In England and in America the courts resorted to a great variety of devices and formulas to destroy this encroachment on their monopoly of the administration of justice, protecting what they called their "jurisdiction." An attempt to enumerate the ways in which arbitration agreements were declared to be against public policy and void or revocable or unenforceable would now serve no useful purpose. See *Kulukundis Shipping Co., S/A* v. *Amtorg Trading Corp.*, 2 Cir., 1942, 126 F. 2d 978, 982. Suffice it to say for a considerable time prior to the passage of the Arbitration Act in 1925[4] the Congress had come to the conclusion that an effort should be made to legislate on the subject of arbitration in such fashion as to remove the hostility of the judiciary and make the benefits of arbitration generally available to the business world. See Sen. Rep. 536 *supra*. At that time and even today, in various states judge-made law still stands as an obstacle to the enforceability of arbitration agreements, as was illustrated in *Bernhardt*. It was not assumed that this hostility could be easily overcome, despite certain encouragement in the ranks of those in opposition. See *Red Cross Line* v. *Atlantic Fruit Co.*, 1924, 264 U. S. 109; *Atlantic Fruit Co.* v. *Red Cross Line*, S. D. N. Y., 1921, 276 Fed. 319, affirmed 2 Cir., 1924, 5 F. 2d 218; *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, S. D. N. Y., 1915, 222 Fed. 1006. Hence the Congress took pains to utilize as much of its power as it could and by doing so it sought to reduce to a minimum the danger of judicial rejection on constitutional grounds.

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[4] The federal Arbitration Act, Title 9 of the United States Code was first enacted in 1925 43 Stat. 883. It was repealed and substantially re-enacted in codified form in 1947, 61 Stat. 669.

[fol. 59] Thus we think the text of the Act and the legislative history demonstrate that the Congress based the Arbitration Act in part on its undisputed substantive powers over commerce and maritime matters. To be sure much of the Act is purely procedural in character and is intended to be applicable only in the federal courts. But Section 2 declaring that arbitration agreements affecting commerce or maritime affairs are "valid, irrevocable, and enforceable" goes beyond this point and must mean that arbitration agreements of this character, previously held by state law to be invalid, revocable or unenforceable are now made "valid, irrevocable, and enforceable." This is a declaration of national law equally applicable in state or federal courts. See Kochery, The Enforcement of Arbitration Agreements in the Federal Courts: *Erie* v. *Tompkins*, 39 Corn. L. Q. 74, 78 (1953). This conclusion flows directly from the realization by the Congress that nothing of significance would have been accomplished without tapping these substantive sources of power. It is these that put teeth into the statute and make it accomplish the salutary and beneficial ends the Congress had in mind. It matters not that in the interval of years since the passage of the Act this point has only rarely been noticed. See *Standard Magnesium Corp.* v. *Fuchs*, 10 Cir., 1957, 251 F. 2d 455; *Kentucky River Mills* v. *Jackson*, 6 Cir., 1953, 206 F. 2d 111, 117-18, cert. denied, 346 U. S. 887. What does matter is whether or not this reasoning is sound. And we believe it to be sound if the Congress intended to use to the fullest possible extent its powers to regulate commerce as it was affected by arbitration agreements and to do the same thing in the field of maritime law.

Nor do we think there is any tenable distinction between the holding in *Bernhardt* that the enforceability of an arbitration agreement is sufficiently substantive to call into play the *Erie* doctrine and our holding in this case that [fol. 60] the questions of the validity and interpretation of the arbitration agreement before us are substantive questions. In any event, it seems safe to say that those who drafted the Arbitration Act and supervised its progress through the House and Senate Committees had not the least suspicion that there might at some future day be

raised the constitutional question referred to in Mr. Jus
Frankfurter's concurring opinion in *Bernhardt*, the av
ance of which led him to the view that the Arbitration
was wholly inapplicable to cases where the jurisdictio
the federal court was based on diversity of citizens
Erie still was hidden in the mist of the future.

Mere catchwords, labels and cliches no longer sm
the path of justice as they so often did in the past.
note above, arbitration has often been described as
taining to the law of remedies, but this tendency is lo
much of its fascination in these modern times See
v. *Twentieth Century-Fox Film Corp.*, 9 Cir., 1956, 23
2d 632; *Jackson* v. *Atlantic City Electric Co.*, D. N. J., 1
144 F. Supp. 551; *Miller* v. *American Insurance Co.*, W
Ark., 1954, 124 F. Supp. 160; Kochery, The Enforcem
of Arbitration Agreements in the Federal Courts:
v. *Tompkins, supra;* Note, 56 Colum. L. Rev. 502 (19
41 Va. L. Rev. 379 (1955); Comment 27 Tex. L. Rev.
(1948). The opinion of Mr. Justice Douglas in *Bernh*
summarizes nicely the manifold effects of such ag
ments.[5] We need not belabor them here. The crucial p
is that the "nature of the tribunal where suits are trie
an important part of the parcel of rights behind a caus
action." See 350 U. S. at 203. Whether the bargain
denced by the contract or agreement is or is not valid
not differ essentially from the question of whether
other meeting of the minds of the parties will be re
[fol. 61] nized as having created certain rights. And
same may be said of the rules or principles to be evo
in connection with the construction and interpretatio
the agreement.

It is interesting to note that though new substan
federal rights were created, suits involving the applica
of the Arbitration Act do not furnish an independent b
of federal jurisdiction under 28 U. S. C. Section 1
Krauss Bros. Lumber Co. v. *Louis Bossert & Sons*,
2 Cir., 1933, 62 F. 2d 1004; *In re Woerner*, 2 Cir., 1929
F. 2d 283; *Mengel Co.* v. *Nashville Paper Products*
Specialty Workers Union, 6 Cir., 1955, 221 F. 2d 644.
see *Local 19, Warehouse Union* v. *Buckeye Cotton Oil*

[5] 350 U. S. at 203-04.

6 Cir., 1956, 236 F. 2d 776, 781, cert. denied, 1957, 354 U. S. 910. This is evident upon consideration of the Act as a whole as the Congress under its Article III powers sought to prevent the federal courts from becoming unduly snarled by this far-reaching law. Section 4 relating to the filing of a petition to compel arbitration provides for such filing only in "any court of the United States which, save for such agreement, would have jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties." And proceedings on motion for a stay pursuant to Section 3 are authorized only in "the court in which * * * suit is pending," which must mean a suit in which the court already has jurisdiction over subject matter. Section 8* also [fol. 62] seems to presuppose a basis of jurisdiction other than the Arbitration Act. The explicitness with which the Congress indicated that the assertion or denial of a right arising under the Act is not sufficient to give the federal court jurisdiction over subject matter constitutes further proof that something more than mere "procedural" rules were intended. For if the Act were entirely "procedural" in character, it plainly could not furnish a basis of federal jurisdiction.

While the jurisdiction under either Section 3 or Section 4 may doubtless in some instances be federal question jurisdiction, based upon rights alleged to arise out of some federal statute other than the Arbitration Act, it would seem that the most numerous class of cases in which it was anticipated that resort would be made to the federal courts

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* Section 8 of the Act provides:

"If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

for the enforcement of arbitration agreements was d
versity cases.

We, therefore, hold that the Arbitration Act in makir
agreements to arbitrate "valid, irrevocable and enforc
able" created national substantive law clearly constit
tional under the maritime and commerce powers of t
Congress and that the rights thus created are to be a
judicated by the federal courts whenever such courts ha
subject matter jurisdiction, including diversity cases, ju
as the federal courts adjudicate controversies affecti
other substantive rights when subject matter jurisdicti
over the litigation exists.[7] We hold that the body of la
thus created is substantive not procedural in character a
that it encompasses questions of interpretation and co
struction as well as questions of validity, revocability a
enforceability of arbitration agreements affecting inte
[fol. 63] state commerce or maritime affairs, since the
two types of legal questions are inextricably intertwined.

In the case before us there can be little doubt that t
transaction in question relates to an interstate shipme
of goods and involves "commerce" within the meaning
Sections 1 and 2.[8] *Kentucky River Mills* v. *Jackson*, 6 Ci
1953, 206 F. 2d 111, cert. denied, 346 U. S. 887; *Petition*
Prewost Lefebvre, S. D. N. Y., 1952, 105 F. Supp. 75
Wilson & Co. v. *Fremont Cake & Meal Co.*, D. Neb., 19
77 F. Supp. 364, affirmed, 8 Cir., 1950, 183 F. 2d 57. W
therefore, find federal law as derived from the Arbitrati
Act to be controlling.

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[7] We think the court in *Ross* v. *Twentieth Century-Fox F*
Corporation, 9 Cir., 1956, 236 F. 2d 632, misconstrued *Bernha*
when it held that the contract in that case, which involved co
merce, was required by the *Bernhardt* reasoning to be interpre
according to California law.

[8] Section 1 of the Act provides in part:
"'commerce,' as herein defined, means commerce among the s
eral States or with foreign nations, * * *"

II

Formulation and Application of Substantive Rules Governing Arbitration Agreements Involving Commerce

We now turn to the decision of this case and the formulation of the principles of federal substantive law necessary for this purpose.

The District Court held that there could be no finding of an "agreement to arbitrate" until it was judicially resolved whether or not there was fraud in the inception of the contract as alleged by Lawrence. But surely this is oversimplification of the problem. For example, it would seem to be necessary to answer the following questions before we can decide to affirm or reverse the order appealed from: (1) is there anything in the Arbitration Act or elsewhere to prevent the parties from making a binding agreement to arbitrate any disputes thereafter arising between them, including a dispute that there had been fraud in the inception [fol. 64] of the contract; (2) is the exception of Section 2, "save upon such grounds as exist at law or in equity for the revocation of any contract" applicable if such an agreement to arbitrate has been made and the only fraud charged is fraud in inducing the purchase of the goods, rather than fraud in connection with the making of the agreement to arbitrate; (3) did the parties in the case before us make a binding agreement to arbitrate; and (4) is the arbitration clause broad enough to cover the charge of fraud.

That the Arbitration Act envisages a distinction between the entire contract between the parties on the one hand and the arbitration clause of the contract on the other is plain on the face of the statute. Section 2 does not purport to affect the contract as a whole. On the contrary, it makes "valid, irrevocable, and enforceable" only a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction"; and Section 3 provides for the granting of a stay in any suit or proceeding in the federal courts "upon an issue referable to arbitration under an agreement in writing for such arbitration."

Our construction of Section 2 treating the agreement to arbitrate as a separable part of the contract is based not only upon the clear wording of the text but is buttressed by several other pertinent considerations. Historically arbitration clauses were treated as separable parts of the contract, although such treatment generally meant the agreement was being deprived of its efficacy. *Hamilton* v. *Home Insurance Co.*, 1890, 137 U. S. 370; *Gatliff Coal Co.* v. *Cox*, 6 Cir., 1944, 142 F. 2d 876; *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, S. D. N. Y., 1915, 222 Fed. 1006. And since the passage of the Arbitration Act, the courts have similarly held that the illegality of part of the contract does not operate to nullify [fol. 65] an agreement to arbitrate. *Wilko* v. *Swan*, 2 Cir., 1953, 201 F. 2d 439, reversed on other grounds, 346 U. S. 427; *Watkins* v. *Hudson Coal Co.*, 3 Cir., 1945, 151 F. 2d 311, cert. denied, 327 U. S. 777; *Petition of Prouvost Lefebvre*, S. D. N. Y., 1952, 105 F. Supp. 757. Nor does the alleged breach or repudiation of the contract preclude the right to arbitrate. *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 2 Cir., 1943, 126 F. 2d 978; *Almacenes Fernandez, S.A.* v. *Golodetz, supra*, 2 Cir., 148 F. 2d 625; *In re Pahlberg Petition*, 2 Cir., 1942, 131 F. 2d 968.

Finally, any doubts as to the construction of the Act ought to be resolved in line with its liberal policy of promoting arbitration both to accord with the original intention of the parties and to help ease the current congestion of court calendars. Such policy has been consistently reiterated by the federal courts and we think it deserves to be heartily endorsed. See *Shasferoke Coal & Supply Corp.* v. *Westchester Service Corp.*, *supra*, 293 U. S. 449, 453; *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, *supra*, 2 Cir., 126 F. 2d 978; *Signal-Stat Corp.* v. *Local 475*, 2 Cir., 1956, 235 F. 2d 298, cert. denied, 1957, 354 U. S. 911. See also *Wabash Ry.* v. *American Refrigerator Transit Co.*, 8 Cir., 1925, 7 F. 2d 335, 351, cert. denied, 1926, 270 U. S. 643.

It would seem to be beyond dispute that the parties are entitled to agree, should they desire to do so, that one of the questions for the arbitrators to decide in case the controversy thereafter arises, is whether or not one of the

parties was induced by fraud to make the principal contract for the delivery of the merchandise. Surely there is no public policy that would stand as a bar to an agreement of such obvious utility, as is demonstrated by the facts of this case. The issue of fraud seems inextricably enmeshed in the other factual issues of the case. Indeed, the difference between fraud in the inducement and mere failure of per- [fol. 66] formance by delivery of defective merchandise depends upon little more than legal verbiage and the formulation of legal conclusions. Once it is settled that arbitration agreements are "valid, irrevocable, and enforceable" we know of no principle of law that stands as an obstacle to a determination by the parties to the effect that arbitration should not be denied or postponed upon the mere cry of fraud in the inducement, as this would permit the frustration of the very purposes sought to be achieved by the agreement to arbitrate, i.e. a speedy and relatively inexpensive trial before commercial specialists.

The saving clause of Section 2 fits perfectly into the framework disclosed by the above analysis. The agreement described in Section 2 is the arbitration "provision" or clause of the principal contract. If this arbitration clause was induced by fraud, there can be no arbitration; and if the party charging this fraud shows there is substance to his charge, there must be a judicial trial of that question before a stay can issue in a case of the type with which we are now dealing. It is not enough that there is substance to the charge that the contract to deliver merchandise of a certain quality was induced by fraud.

Did the parties in the case before us make a binding agreement to arbitrate? While this narrow issue was obscured in the court below by the miscellaneous and varied contentions of the parties, we think it clear that there were no grounds "at law or in equity" for the revocation of the arbitration clause of the contract between Lawrence and Devonshire. Indeed, there is no dispute on the point. Lawrence does not allege that the arbitration provision was induced by fraud. Nor could it do so with any show of reason as its own order contained this identical clause. What Lawrence does claim is that the entire transaction was induced by fraud and that the arbitration provision

necessarily falls with the rest. This contention we reject as [fol. 67] above stated, because the facts of this case do not support the argument.

Accordingly, there is no reason why we should not now decide this preliminary issue and we hereby find that the parties did agree upon the arbitration clause quoted in the early part of this opinion and that such agreement is valid and binding.

It may well be that such charges of fraud may in some cases postpone arbitration because there is so little to support the finding that the parties agreed to arbitrate as to make necessary a preliminary trial of the issue of alleged fraud, to be followed by another trial before the arbitrators if there is found by the court to have been no fraud. As has been shown, this case is different. And we would suppose that generally where the arbitration provision of the contract is sufficiently broad to encompass the issue of fraud, the mutual promises to arbitrate would form the *quid pro quo* of one another and constitute a severable and enforceable part of the agreement. We do not decide this point, however, as it is not necessarily before us.

Certainly this is not a case like *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, *supra*, 2 Cir., 126 F. 2d 978, where the defendant denied ever agreeing to anything. Naturally such a question had first to be settled before arbitration could be directed. But it is remarkably similar to *Almacenes Fernandez, S.A.* v. *Golodetz*, 2 Cir., 1945, 148 F. 2d 625, where "fraud in the performance" was held to be an arbitrable question. See also *Reynolds Jamaica Mines, Ltd.* v. *La Societe Navale Caennaise*, 4 Cir., 1956, 239 F. 2d 685; *McElwee-Courbis Construction Co.* v. *Rife*, M. D. Pa., 1955, 133 F. Supp. 790. The issue of fraud in the procurement of the contract was evidently litigated by consent in *Kentucky River Mills* v. *Jackson*, *supra*, 6 Cir., 206 F. 2d 111, 120, cert. denied, 346 U. S. 887, but the broad dictum at page 120 would seem to indicate that the charge of fraud must in every case be judicially tried and disposed of. If [fol. 68] this be a fair interpretation of the language of the opinion we think it too broad and we disagree with it.

In the view we take of the case before us it is immaterial that Lawrence claims to have rescinded the contract and

that Devonshire disputed this claim and asserts that Lawrence by later inconsistent acts waived any right to rescind. We say there was a valid agreement to arbitrate, that all that remains is to construe the agreement and that the controversy over fraud in the inducement, whether Lawrence affirmed or disaffirmed the contract and attempted to or did rescind it, is a "complaint, controversy or question" which arose "with respect to this contract."

What is the proper construction and interpretation of the arbitration clause? Did the parties intend the arbitration proceedings to encompass a charge of fraud in the inducement to make the principal contract for delivery of the merchandise? We think it is clear that the parties did just that. It would be hard to imagine an arbitration clause having greater scope than the one before us. Certainly fraud in the inducement is a "complaint, controversy or question which may arise with respect to this contract that cannot be settled by the parties thereto." And we fail to perceive any rational basis for thinking that the issue is of such a character that only the courts can resolve it. We think that the charge of fraud in the inducement comes squarely within the phraseology of this particular agreement and that nothing short of a renascence of the old judicial hostility to arbitration could evolve a contrary ruling.

We note that were we compelled to apply New York law to the problems involved in this case, we would have been forced to arrive at a contrary conclusion. Had this not been so, we would not have given such detailed consideration to the choice of the applicable law. But the pattern and substance of New York law appear to be different than what we have found the federal law to be.

[fol. 39]

This seems to have been made clear in the 1957 decision of the New York Court of Appeals in *Matter of Weaver Advertiser Corp. (Piotnick)*, 3 N. Y. 2d 17, 143 N. E. 2d 366. Piotnick claimed that he had been induced to pay $6,189 when the agreement was executed "for the purchase of supplies for distribution, on the strength of misrepresentation respecting the past business of the manufacturer, respecting a patent which the manufacturer claimed to have had but did not have, and with regard to the nature of the

product." The arbitration clause which provided for the arbitration of any question "as to the validity, interpretation or performance of this agreement," was held not to encompass the question of fraud in the inducement. There was a strong dissent by Judge Burke, in which Judge Fuld and Judge Froessel concurred. There was no discussion of the separability of the arbitration agreement. Perhaps the Court of Appeals would have arrived at a different result had it been construing the somewhat broader language of the arbitration clause now before us. But with all due respect to a distinguished and able court, we think the approach to the problem by the New York Court of Appeals too narrow. This restrictive New York policy is also reflected in the opinions in several other cases. *Manufacturers Chemical Co.* v. *Caswell*, 1 Dep't, 1940, 259 App. Div. 321, 19 N. Y. S. 2d 171, appeal dismissed, 283 N. Y. 679, 28 N. E. 2d 404; *Cheney Bros.* v. *Joroco Dresses, Inc.*, 1 Dep't, 1926, 218 App. Div. 652, 219 N. Y. Supp. 96, reversed on other grounds, 245 N. Y. 377, 157 N. E. 272; *Reo Garment, Inc.* v. *Jason Corp.*, Sup. Ct. Spec. T., 1958, 9 Misc. 2d 521, 170 N. Y. S. 2d 412; *Greenspan* v. *Greenspan*, Sup. Ct., Spec. T., 1954, 129 N. Y. S. 2d 258.

[fol. 70] III

There Was No Waiver

One more point in this fascinating case remains to be disposed of. Lawrence asserts that Devonshire has waived its right to arbitrate or was "in default in proceeding with such arbitration" under Section 3 of the Act. The complaint was filed May 9, 1957 and in its answer filed June 13, 1957 Devonshire demanded arbitration. The motion for the stay of proceedings was made almost nine months later, March 4, 1958. During this time settlement was discussed and Devonshire consented to an examination before trial of its President. Such examination was adjourned repeatedly and has not yet been taken. Lawrence also maintains it released certain information to Devonshire otherwise unavailable and that Devonshire tested the disputed goods. The delay in moving for a stay and these various intervening acts are asserted to constitute the waiver or default. Such a contention, however, is without merit under the

decided cases. Devonshire has at no time acted in a manner inconsistent with its right to arbitrate. Lawrence was apprised of Devonshire's intention to arbitrate from the time the answer was filed and the intervening steps taken with a view toward settlement can in no way affect Devonshire's rights. Indeed, considerably more significant intervening steps have not been regarded as amounting to a waiver. See *Farr & Co.* v. *Cia Intercontinental De Navegacion De Cuba, S.A.*, 2 Cir., 1957, 243 F. 2d 342; *Almacenes Fernandez, S.A.* v. *Golodetz, supra; Kulukundis Shipping Co.* v. *Amtorg Trading Corp., supra; Reynolds Jamaica Mines Ltd.* v. *La Societe Navale Caennaise, supra.* In the instances where a waiver has been found the party seeking the arbitration generally first brought up the subject only after long delay or when the trial was near at hand. *American Locomotive Co.* v. *Chemical Research Corp.*, 6 Cir., [fol. 71] 1948, 171 F. 2d 115, cert. denied, 1949, 336 U. S. 909; *Radiator Specialty Co.* v. *Cannon Mills, Inc.*, 4 Cir., 1938, 97 F. 2d 318; *La Nacional Platanera, S.C.L.* v. *North American F. & S.S. Corp.*, 5 Cir., 1936, 84 F. 2d 881. The claim that Devonshire's rejection of an offer by Lawrence to arbitrate also constituted a waiver is likewise lacking in substance in view of the conditional nature of the offer.

Reversed with a direction to grant the stay.

[fol. 72]

In United States Court of Appeals
For the Second Circuit

Robert Lawrence Company, Inc., Plaintiff-Appellee,

—v.—

Devonshire Fabrics Inc., Defendant-Appellant.

Judgment—October 28, 1959

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and action remanded with a direction to grant the stay in accordance with the opinion of this court, with costs to the appellant.

A. Daniel Fusaro, Clerk.

[fol. 73] [File endorsement omitted]

[fol. 74] Clerk's certificate to foregoing transcript (omitted in printing).

[fol. 75]

SUPREME COURT OF THE UNITED STATES

No. 659, October Term, 1959.

ROBERT LAWRENCE COMPANY, INC., Petitioner,

vs.

DEVONSHIRE FABRICS, INC.

ORDER ALLOWING CERTIORARI—March 7, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.